Dickerson-Chapman, Inc. *and* International Union of Operating Engineers, Local No. 624, AFL–CIO. Case 15–CA–11294–2

January 22, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On October 15, 1990, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 15–RC–7485. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On November 27, 1990, the General Counsel filed a Motion for Summary Judgment. On December 4, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause on or before December 18, 1990, why the General Counsel's motion should not be granted. On December 14, 1990, the Respondent filed a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but denies that its conduct was unlawful on the grounds that the Board's failure to resolve the status of seven individuals who were permitted to vote subject to challenge in the underlying representation proceeding renders the Board's certification invalid.[1] It contends, in its brief to the Board, that the General Counsel's motion must be denied because the unresolved status of the seven individuals raises factual issues requiring a hearing.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence,[2] nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Mississippi corporation with an office and place of business in Jackson, Mississippi, is engaged as a utility contractor in the construction industry and provides communication support services to various companies, including South Central Bell Telephone Company, a Division of Bell South Corporation, a Georgia corporation with an office and place of business in Jackson, Mississippi, which operates as a public utility providing telephone communication services in various States including Mississippi and Louisiana.

During the 12-month period ending August 31, 1990, the Respondent, in the course and conduct of its business operations, provided services in excess of $50,000 for South Central Bell Telephone Company. During the same period, South Central Bell Telephone Company, in the course and conduct of its business operations, derived gross revenues in excess of $1 million and purchased and received at its Jackson, Mississippi facility products, goods, and materials valued in excess of $50,000 directly from points and places located outside the State of Mississippi. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] Following the election in which the challenged ballots proved nondeterminative, the Regional Director issued a Decision and Certification of Representative, overruling in the process the Employer's objections to the election, which alleged, inter alia, that the bargaining unit was inappropriate because it allegedly included supervisory employees, including the seven individuals. By order dated July 17, 1990, the Board denied the Employer's request for review of the Regional Director's determination as it raised no substantial issues warranting review.

[2] The Respondent has submitted with its brief to the Board certain documents that it contends were not available during the representation hearing, and which purport to show that certain individuals who the Regional Director included in the bargaining unit in the underlying representation proceeding are in fact statutory supervisors and should have been excluded. It argues that the Board should deny the General Counsel's motion on the basis of this previously unavailable evidence. We find no merit in the Respondent's contention. Many of the documents that the Respondent relies on are undated and, except for the Respondent's unsupported assertion to the contrary, were not shown to have been previously unavailable. As to other documents, the dates contained thereon clearly establish that they were available for production by the Respondent either during the representation hearing or during the Regional Director's investigation of the Respondent's objections to the representation election. The remaining documents, consisting of amended job descriptions apparently prepared after the Union's certification and submitted for the purpose of showing that certain unit employees possess supervisory authority, reveal only that the Respondent vested certain employees with such authority after the Union was certified and clearly have no bearing on the validity of the certification. Finally, as noted in our Order of December 26, 1990, denying the Respondent's request for review in Case 15–UC–123, in the event that the status of these individuals is not resolved in a pending unfair labor practice case, any party may file a new unit clarification petition.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held on March 14, 1990, the Union was certified on May 9, 1990, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time operational service personnel, including operators, laborers, drivers, operator/drivers, crew leaders, maintenance employees, driver/foremen, foremen/trainee, service wire foremen, pole foremen, conduit foremen, cable foremen employed by the Employer and working at its Jackson, Mississippi facility; excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

On or about May 14, 1990, and again on or about July 24, 1990, the Union has requested the Respondent to bargain and, since on or about May 14, 1990, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after May 14, 1990, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Dickerson-Chapman, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Operating Engineers, Local No. 624, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time operational service personnel, including operators, laborers, drivers, operator/drivers, crew leaders, maintenance employees, driver/-foremen, foremen/trainee, service wire foremen, pole foremen, conduit foremen, cable foremen employed by the Employer and working at its Jackson, Mississippi facility; excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Post at its facility in Jackson, Mississippi, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union of Operating Engineers, Local No. 624, AFL–CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time operational service personnel, including operators, laborers, drivers, operator/drivers, crew leaders, maintenance employees, driver/-foremen, foremen/trainee, service wire foremen, pole foremen, conduit foremen, cable foremen employed by the Employer and working at its Jackson, Mississippi facility; excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

DICKERSON-CHAPMAN, INC.